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No. 80-111

IN THE

Supreme Court of the United States

October Term, 1980.

ANNA BARR and ABRAHAM BARR, as Administrators *de bonis non* of the goods, chattels and credits of THOMAS NATHANIEL BARR, Deceased,

Petitioners,

vs.

THE CITY OF NEW YORK AND NEW YORK HEALTH AND HOSPITAL CORPORATION, JAMAICA HOSPITAL, ALFRED H. SMITH M.D., NORBERT GERSTEN HARBER, M.D., GEORGE OTEIFA M.D., and KIMITRIOS KOTSILUMBUS, M.D.,

Respondents.

Brief of Respondent, Jamaica Hospital, in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the State of New York and Appellate Division, Second Department.

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Brief of Respondent Jamaica Hospital in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the State of New York and Appellate Division, Second Department.

Preliminary Statement.

This brief if submitted in opposition to the petition for a writ of certiorari to the Court of Appeals of the State of

New York and the Appellate Division, Second Department, for a review by this Court of a dismissal of the cause of action for wrongful death as barred by the Statute of Limitations.

Question Presented.

Petitioner alleges that the dismissal by the State Courts of the alleged cause of action for wrongful death of plaintiffs' decedent constituted a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

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Statutes in Question.

The Estates, Powers and Trusts Law §5-4.1 provides as follows:

> "The personal representative, duly appointed in this State or any other jurisdiction, of a decedent who is survived by distributees and may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a Will appointing an Executor who refuses to bring such an action, the distributees are entitled to have an Administrator appointed to prosecute the action for their benefit."

Statement of the Case.

Plaintiffs' decedent was admitted to the Jamaica Hospital on April 2, 1970, after having been struck by an automobile. The deceased underwent an operative procedure for the repair of a mandibular fracture and expired at the Jamaica Hospital on April 13, 1970. A summons dated March 7, 1975, and a complaint verified on March 10, 1975, were some time thereafter served upon representatives of the Jamaica Hospital.

Among the allegations of the complaint was a contention by the plaintiffs that they had been precluded from ascertaining the nature of the malpractice claim because of fraudulent misrepresentation as to the cause of decedent's death on the part of respondent Jamaica Hospital personnel.

During the course of depositions of plaintiffs, Anna Barr and Abraham Barr, the former plaintiff indicated that she neither requested nor obtained a copy of the hospital record subsequent to the death of the decedent, nor did she have any recollection of having made inquiry of any personnel at Jamaica Hospital as to the cause of death. She categorically stated that she had no recollection of Jamaica Hospital concealing any facts from her prior to June, 1974. It was on this latter date that plaintiffs allegedly became aware of the cause of decedent's death during the course of a trial of a liability issue concerning the driver of the motor vehicle who had struck the decedent prior to his arrival at the Jamaica Hospital.

Abraham Barr, when questioned concerning the basis for his claim of fraud and misrepresentation, stated as follows:

> "I didn't ask them anything about it so I can't say that they concealed anything, because I didn't seek anything until this point."

Copies of relevant portions of the depositions were made a part of the record in the courts below.

Argument and Opposition to the Petition.

1. U. S. Sup. Ct. Rule 19(1)(a) provides in part that, while neither controlling nor fully measuring the Court's discretion, it is indicative of the character of the reasons for which certiorari will be granted, that consideration will be given "where a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accordance with applicable decisions of this Court."

Rule 15(1)(d) requires that the petitioner set forth concisely the time during which the Federal question was raised in the State Court proceedings. A reading of those two rules, coupled with the petition as set forth in support of the request for certiorari, makes it rather clear that the issue as to the constitutionality of the provisions of the New York State Law governing Statute of Limitations for wrongful death actions was never raised or decided in the State Courts below. For this reason alone, the issue as to the constitutionality of a State statute is not properly before this Court.

2. The cases cited by peititioners in support of their petition fail to establish any basis upon which it can be claimed that the dismissal of their action, based upon failure to comply with the Statute of Limitations, was in any way a deprivation of property without due process.

In *Central Land Co. v. Laidley,* 159 U. S. 103, this Court was concerned with the validity of a verification for the conveyance of real property by a married woman. It was noted in that decision that the Tenth Amendment merely prohibited interference with contract rights and the Court was not concerned with the correctness of decisions of the State Courts. The petitioner's quotation of a small portion of the decision is directly contrary to their position, since the import of the quotation set forth is that even if a decision of the highest Court in a state is clearly erroneous, it does not thereby present a question of deprivation of property without due process in contravention of the Fourteenth Amendment so as to form a basis for the granting of certiorari.

In *Fuentes v. Shevin,* 407 U. S. 67, cited by the peititioner at page 3 of the petition, the Court was faced with the constitutionality of the Florida and Pennsylvania

statutes which authorized summary seizure of goods or chattels in a person's possession under a writ of replevin. Petitioner's reliance on this case is misplaced, since these were *ex parte* applications made without opportunity to be heard. In the instant case, petitioners have been heard at *nisi prius,* the Appellate Division of the New York Supreme Court, and the Court of Appeals of the State of New York. The limited interpretation of the words "being heard," which petitioner would have this Court adopt, is that they are entitled to a full trial. This is obviously different from the position of the Court in *Fuentes* wherein it was held that a person be fully apprised of and given an opportunity to contest actions involving his rights to property.

Parenthetically, it should be noted that under New York Law, the right to recover for wrongful death is, in any event, a purely statutory right. Plaintiffs' claim to a pre-existing property right is somewhat misplaced in that the provisions of the Estates, Powers and Trusts Law, §5-4.1 make the commencement of the action within a two-year period a condition precedent to the existence of such right. The existence of such limitation upon a right for recovery for wrongful death is well known and has long been acknowledged in this Court (see 51 Am. Jur. 2d [Limitations of Actions] §15, page 599, and 22 Am. Jur. 2d [Death] §35, page 632).

It is stated at 51 Am. Jur. 2d (Limitations of Actions) §12, page 598, that "it is well recognized that the legislature of each State has a power to enact Statutes of Limitations effective within that State. The establishment of Statutes of Limitations is always a legislative prerogative." Based upon the foregoing, it is clear that the only right which plaintiffs have and of which they claim to have been deprived without due process of law, is the very right which the Statute granted them and upon which it

was conditioned that they commence their action within two years from the date of death. A rather complete treatise on the nature and history of the wrongful death statute in the State of New York is contained in *Grant v. Guidotti,* 66 A. D. 2d 545, 414 N. Y. S. 2d 171.

The other cases cited by petitioner are equally inappropriate to support the claim raised in this petition. In *Millane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, the Court merely held that notice by publication in a local newspaper was insufficient notice within the meaning of the Fourteenth Amendment as to persons whose identity and location were in fact known to the Trustee. *Boddi v. Connecticut,* 401 U. S. 371, held that due process prohibited a state from denying, solely because of inability to pay, access to its trial court to individuals who sought the dissolution of their marriages. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* stands for the proposition that a state judiciary, as well as a legislature, may be guilty of deprivation of property without due process of law. This case involved discriminatory tax on bank stock because of inquality in valuation. The lower courts in that case had held that the plaintiffs had failed to exhaust an administrative remedy which, in fact, was non-existent because the same courts had consistently upheld the refusal by the agency to review questions such as those posed by petitioner. This Court held that relegating petitioner to an administrative proceeding which those courts knew was unavailable and which they specifically determined was unavailable because of the laches of the petitioner, constituted an unwarranted deprivation of property without due process and mandated reversal.

The case of *Wheeler v. Jackson,* 137 U. S. 245, cited by petitioner, in fact stands for a proposition adverse to the position argued by petitioner. In the facts of that case, a six-month Statute of Limitations within which to bring

suit against the City of Brooklyn for delivery or execution of leases which had been purchased for nonpayment of taxes, was being tested. That statute involved a shortening of a period of time within which suit could be brought. This Court, supra 225, stated as follows:

> "It is the settled doctrine of this Court that a legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which to enforce existing causes of action may be commenced, providing, in each case, a reasonable time, taking all these circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect."

Conclusion.

The petition for a writ of certiorari to the Court of Appeals and Appellate Division, Second Department, does not involve a review of a determination by a State Court of a Federal question, since no Federal question was ever raised before the State Courts. The existence of a Statute of Limitations is a well-recognized and long-standing legislative right which, in the case at bar, is not unduly burdensome.

The petition for a writ of certiorari is not designed to review factual questions as to the issue of estoppel against the Jamaica Hospital and said determination by the Courts of the State of New York is a final determination of said factual issues. Accordingly, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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